91-963

Supreme Court, U.S.
FILED
DEC 12 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

THE STATE OF COLORADO,
Petitioner,
vs.

PETE GARCIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
On Certiorari to the Colorado Supreme Court
Supreme Court No. 90SC416

GALE A. NORTON*
Attorney General
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
JOHN DANIEL DAILEY
Deputy Attorney General
ROBERT MARK RUSSEL
First Assistant Attorney General
PAUL KOEHLER
Assistant Attorney General
Appellate Section
Attorneys for Petitioner
110 Sixteenth St., 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4540
***Counsel of Record**

QUESTION PRESENTED FOR REVIEW

Whether, as explicitly left undecided by this Court in *Hill v. Lockhart*, 474 U.S. 52 (1985), criminal defense attorneys are ineffective under the federal constitution for failing to advise correctly their clients about a collateral consequence of a guilty plea?

TABLE OF CONTENTS

PAGE

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

FACTUAL BACKGROUND 3

REASONS FOR GRANTING THE WRIT 5

I. THIS COURT GRANTED A WRIT OF CERTIORARI ON THE ISSUE PRESENTED HERE IN *HILL V. LOCKHART*, BUT DID NOT REACH IT ON PROCEDURAL GROUNDS. 6

II. THERE IS A STRONG SPLIT AMONG THE JURISDICTIONS ON THE ISSUE OF THE EFFECT KNOWLEDGE OF COLLATERAL CONSEQUENCES HAS ON GUILTY PLEAS. 7

III. THE REASONING IN *GARCIA* THREATENS THE STRONG INTEREST OUR CRIMINAL JUSTICE SYSTEM HAS IN THE FINALITY OF GUILTY PLEAS. ... 9

CONCLUSION 13

APPENDIX A 15

TABLE OF AUTHORITIES

CASES **PAGE**

Brady v. United States, 397 U.S. 742 (1970) 5

Brown v. Perini, 718 F.2d 784 (6th Cir. 1983) 9

Clark v. State, 736 S.W.2d 483 (Mo.App. 1987) 8

Commonwealth v. Frometa, 520 Pa. 552, 555 A.2d 92 (1989) 7, 8

Cuthrell v. Director of Institutions, 475 F.2d 1364 (4th Cir.), *cert. denied*, 414 U.S. 1005 (1973) 7

Hill v. Lockhart, 474 U.S. 52 (1985) . . . . . i, 2, 4, 6

Hill v. Lockhart, 731 F.2d 568 (8th Cir. 1984) 6, 10

Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990), *cert. denied*, 110 S. Ct. 3258, 111 L. Ed. 2d 767 (1990) 6, 12, 13

Hutchinson v. United States, 450 F.2d 930 (10th Cir. 1971) 8

Kimmelman v. Morrison, 477 U.S. 365 (1986) 12

CASES **PAGE**

McCarthy v. United States, 394 U.S. 467 (1969) 5, 12

McMann v. Richardson, 397 U.S. 759 (1970) 11

Meaton v. United States, 328 F.2d 379 (5th Cir. 1964) 8

Moore v. Hinton, 513 F.2d 781 (5th Cir. 1975) 8

Oyekoya v. State, 558 So.2d 990 (Ala. Crim. App. 1989) 8,11

People v. Correa, 108 Ill. 2d 541, 92 Ill. Dec. 496, 485 N.E.2d 307 (1985) 9

People v. Garcia, 799 P.2d 413 (Colo. App. 1990) 4

People v. Garcia, 815 P.2d 937 (Colo. 1991) 1, 4, 6, 9, 11, 12, 13, 14

People v. Miranda, 184 Ill. App. 3d 718, 133 Ill. Dec. 142, 540 N.E.2d 1008 (1989) 8

People v. Pozo, 746 P.2d 523 (Colo. 1987) 8, 11

Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963) 8

State v. Casseua, 513 So.2d 1045

CASES **PAGE**

(Fla. 1987) 8

State v. Ginebra, 511 So.2d 960
(Fla. 1987) 8

State v. Mott, 407 N.W.2d 581 (Iowa 1987) 8

State v. Nichols, 71 N.J. 358,
365 A.2d 467 (1976) 9

State v. Reid, 372 A.2d 626
(N.J.App. 1977) 8

State v. Rish, 553 A.2d 1145
(Conn. 1989) 8

State v. Santos, 135 Wis.2d 528,
401 N.W.2d 856 (Wis. App. 1987) 8

Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979) 9

Tafoya v. State, 500 P.2d 247
(Alaska 1972) 8

United States v. Campbell, 778 F.2d 764
(11th Cir. 1985) 8, 11

United States v. Crowley, 529 F.2d 1066
(3d Cir. 1976) 8

United States v. Del Rosario, 902 F.2d 55
(D.C. Cir.), *cert. denied*, 111 S. Ct. 352,
112 L. Ed. 2d 36 (1990) 8, 9, 11

CASES **PAGE**

United States v. George, 869 F.2d 333 (7th Cir. 1989) 8, 11

United States v. Parrino, 212 F.2d 919 (2nd Cir.), *cert. denied*, 348 U.S. 840 (1954) 9

United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971) 9

United States v. Timmreck, 441 U.S. 780 (1979) 10

United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988) 8

STATUTES **PAGE**

28 U.S.C. § 1257 (1988) 2

42 U.S.C. § 1983 (1988) 3

RULES **PAGE**

Colo. R. Crim. P. 11 5

Fed. R. Crim. P. 11 5

Sup. Ct. R. 10.1(b) 2

RULES **PAGE**

Sup. Ct. R. 10.1(c) 2

OTHER AUTHORITIES **PAGE**

6 Fed. Proc., L.Ed. § 11 "Civil Rights" (1989) 11

16 Harv. C.R.C.L. L.Rev. 157, 161 n.17 (1981) 10

D. Lee, *Defending 42 U.S.C. § 1983 Actions* (1988) . . . 11

J. Cook & J. Sobrieski, *Civil Rights Actions* (1991) 11

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

THE STATE OF COLORADO,
Petitioner,
vs.

PETE GARCIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
On Certiorari to the Colorado Supreme Court
Supreme Court No. 90SC416

OPINION BELOW

The Colorado Supreme Court held that a criminal defendant could receive constitutionally ineffective assistance of counsel if he was misadvised on the effect a guilty plea would have on unfiled civil litigation. *People v. Garcia*, 815 P.2d 937 (Colo. 1991).

Colorado timely filed its petition for rehearing. On September 16, 1991, the Colorado Supreme Court modified its opinion and denied the petition for rehearing. The Colorado Supreme Court's opinion is attached as Appendix A.

JURISDICTION

Colorado invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (1988). *Garcia* conflicts with the decisions of several United States courts of appeals, *see* Sup. Ct. R. 10.1(b), and addresses an important question of federal constitutional law specifically left undecided by this court in *Hill v. Lockhart*, 474 U.S. 52 (1985). *See* Sup. Ct. R. 10.1(c).

The Colorado Supreme Court based *Garcia* entirely on federal constitutional grounds. It construed the sixth amendment right to counsel clause in light of *Hill v. Lockhart*. The Colorado Supreme Court did not rely on any independent state ground in support of its holding.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime ... without due process of law...."

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

The Fourteenth Amendment of the United States Constitution provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law...."

FACTUAL BACKGROUND

On March 27, 1987, two officers of the Jefferson County, Colorado, Sheriff's Department were shot while executing a search warrant on Garcia's brother's residence (v. 1, pp. 114-117). Garcia and his brother were found inside. Garcia was charged with two counts each of attempted first-degree murder, first-degree assault, and the commission of a crime of violence (v. 1, pp. 9, 13-15).

Garcia's attorney negotiated a plea bargain agreement by which Garcia was to plead guilty to one count of accessory to commit first-degree assault and the charges lodged against him were to be dismissed (v. 1, p. 64). While his attorney was explaining the agreement to him, Garcia told his attorney that he did not want his plea to jeopardize his ability to prevail in a civil suit concerning his arrest. After consulting with several other attorneys, Garcia's attorney advised him that while he believed that the plea would not bar Garcia's ability to file a civil suit, his plea could be used for impeachment purposes (v. 2, pp. 8-9).

Garcia pleaded guilty in compliance with the agreement. In so doing, he signed a written acknowledgment that his attorney had advised him of his rights, he understood that he was waiving certain constitutional rights, he understood the nature of the charge and the elements of the offense to which he was pleading guilty, he understood the possible penalties applicable to his plea, and he was making his plea voluntarily (v. 1, pp. 58-62). The trial court accepted Garcia's plea and imposed sentence (v. 1, p. 68).

Garcia later filed a pro se civil rights complaint in federal district court pursuant to 42 U.S.C. § 1983 (1988).

He filed a similar complaint in state district court. Later, he acquired an experienced civil rights practitioner to represent him in both these matters.

After examining the federal complaint, Garcia's civil counsel abandoned several claims because he believed they were collaterally estopped by Garcia's guilty plea (v. 1, pp. 72-74). Later, both the federal and state courts dismissed Garcia's complaints for various pleading defects (v. 1, pp. 86-91, 93-95). Although the federal district court gave Garcia an opportunity to amend his complaint, there is nothing in the record indicating that he chose to do so.

Garcia then moved to vacate his guilty plea, asserting that he would not have pleaded guilty had he known his plea would have prevented him from prevailing in a civil rights suit challenging his arrest and the decision to charge him. The trial court denied Garcia's motion. Among other things, it noted that Garcia did not contest the validity of its advisement, its acceptance of the plea was a determination that the charge against him was true, and Garcia failed to show any actual prejudice resulting from any alleged incompetency of his defense counsel (v. 1, pp. 81-84).

The Colorado Court of Appeals reversed, finding that Garcia's defense attorney provided him with incorrect advice. *People v. Garcia*, 799 P.2d 413, 415 (Colo. App. 1990). It remanded the matter to the trial court for a determination on whether the advice fell within the acceptable standard of practice.

In a 4-3 decision, the Colorado Supreme Court affirmed. *People v. Garcia*, 815 P.2d 937 (Colo. 1991). Basing its reasoning on this Court's decision in *Hill v. Lockhart*, it held, as several other jurisdictions have held, that

misadvisement on a collateral consequence of a guilty plea could constitute constitutionally ineffective assistance of counsel requiring that the plea be vacated.

The dissents reached a conclusion followed by other jurisdictions. They relied on this Court's language in *Brady v. United States*, 397 U.S. 742, 755 (1970) (emphasis added), that "[a] plea of guilty by one fully aware of the **direct** consequences ... must stand unless induced by threats ... misrepresentation ... or [improper promises]," for the proposition that Garcia had no federal constitutional right to be fully advised by his counsel of the **collateral** consequences of his guilty plea. They also relied on Garcia's failure to claim that: (1) his plea lacked a factual basis, or (2) he did not commit the crimes charged.

REASONS FOR GRANTING THE WRIT

The way to evade a Fed. R. Crim. P. 11 style guilty plea advisement is not to allege ignorance of the plea's direct consequences. The advisement prevents such attacks.[1] Rather, all a defendant need do is find or devise some advice on a collateral consequence of the plea that his attorney failed to give or gave incorrectly. The plea then violates the United States Constitution. The Colorado Supreme Court in

---

[1] Rule 11 was designed to insure that trial courts advise defendants of everything the Constitution requires they need know prior to pleading guilty. *See McCarthy v. United States*, 394 U.S. 467, 465-67 (1969). It insures that guilty pleas are both knowing and voluntary by having trial courts inform criminal defendants of all the direct consequences of their pleas. Colorado and many other jurisdictions, following this Court's leadership, designed similar procedures to insure that all guilty pleas are made in a knowing and voluntary manner. *See* Colo. R. Crim. P. 11.

Garcia followed this rule of law, a rule which is followed in other jurisdictions and threatens to spread to others. Such a trend could leave the vast majority of all criminal convictions open to attack.

I. THIS COURT GRANTED A WRIT OF CERTIORARI ON THE ISSUE PRESENTED HERE IN *HILL V. LOCKHART*, BUT DID NOT REACH IT ON PROCEDURAL GROUNDS.

This case squarely presents the issue left open by this Court in *Hill v. Lockhart*. The Eighth Circuit initially held: (1) defendants have no constitutional right to be advised of the collateral consequences of guilty pleas, and (2) because of that, pleas are valid no matter what advice defendants receive about those consequences. *Hill v. Lockhart*, 731 F.2d 568, 570-72 (8th Cir. 1984).

After accepting certiorari jurisdiction, this Court did not reach the issue presented because Hill had failed to allege he would not have pleaded guilty had he been advised correctly of the collateral consequence. *Hill v. Lockhart*, 474 U.S. at 60. Once this Court identified that failure, it did not reach the collateral consequences issue.

On remand, the trial court found that the advice on the collateral consequence constituted ineffective assistance of counsel, and the Eighth Circuit affirmed. *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir.), *cert. denied*, 110 S. Ct. 3258, 111 L. Ed. 2d 767 (1990). The dissent argued that the advice did not effect the knowing nature of the plea because Hill had been correctly advised of his plea's direct consequences, and

the subject of collateral consequences is not central to what plea bargaining is all about. 894 F.2d at 1011. The Eighth Circuit became one of the number of jurisdictions which follow the rule now adopted by the Colorado Supreme Court.

That same situation occurred in *Garcia*. Defense counsel advised Garcia on the effect his plea would have on a collateral consequence. Garcia made sufficient allegations pursuant to *Hill v. Lockhart* that: (1) his counsel committed an error, and (2) but for that error he would not have pleaded guilty. The Colorado Supreme Court's analysis stopped there. It held, over strong dissent, that it did not matter that the advice concerned a collateral consequence.

II. THERE IS A STRONG SPLIT AMONG THE JURISDICTIONS ON THE ISSUE OF THE EFFECT KNOWLEDGE OF COLLATERAL CONSEQUENCES HAS ON GUILTY PLEAS.

The jurisdictions are badly split on the effect knowledge of collateral consequences has on the validity of guilty pleas. The collateral consequences of a guilty plea are numerous, and many remote. *Commonwealth v. Frometa*, 520 Pa. 552, 555 A.2d 92, 93 (1989). "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cuthrell v. Director of Institutions*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005 (1973). They include, for example, effects on the ability to vote, travel, hold various forms of employment, seek public office,

and maintain parental rights. *See, e.g., United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir.), *cert. denied*, 111 S. Ct. 352, 112 L. Ed. 2d 36 (1990); *Frometa*, 555 A.2d at 93 n.1.

Numerous jurisdictions hold that defense counsel have no affirmative constitutional duty to advise their clients of collateral consequences.[2] In contrast, other jurisdictions find some collateral consequences to be the functional equivalent of direct consequences. They therefore require defense counsel to recognize their importance and advise their clients on them.[3]

In the situation presented here, where a defense attorney gave incorrect or incomplete advice on a collateral consequence, some jurisdictions have begun holding that the

---

[2] *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C.Cir.), *cert. denied*, 111 S. Ct. 352, 112 L. Ed. 2d 316 (1990); *United States v. George*, 869 F.2d 333, 338 (7th Cir. 1989); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 768-69 (11th Cir. 1985); *United States v. Crowley*, 529 F.2d 1066, 1072 (3d Cir.), *cert. denied*, 425 U.S. 995 (1976); *Moore v. Hinton*, 513 F.2d 781, 782-83 (5th Cir. 1975); *Hutchinson v. United States*, 450 F.2d 930, 931 (10th Cir. 1971); *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965); *Redwine v. Zuckert*, 317 F.2d 336, 338 (D.C. Cir. 1963); *Oyekoya v. State*, 558 So.2d 990, 990-91 (Ala. Crim. App. 1989); *Commonwealth v. Frometa*, 520 Pa. 552, 555 A.2d 92, 93 (1989); *State v. Casseua*, 513 So.2d 1045, 1045 (Fla. 1987); *State v. Mott*, 407 N.W.2d 581, 583 (Iowa 1987); *State v. Ginebra*, 511 So.2d 960, 962 (Fla. 1987); *Tafoya v. State*, 500 P.2d 247, 252 (Alaska 1972), *cert. denied*, 410 U.S. 945 (1973); *State v. Rish*, 553 A.2d 1145, 1150-51 (Conn. App.), *cert. denied*, 493 U.S. 818 (1989);*State v. Santos*, 135 Wis.2d 528, 401 N.W.2d 856, 858 (Wis. App. 1987); *Clark v. State*, 736 S.W.2d 483, 484 (Mo.App. 1987); *State v. Reid*, 372 A.2d 626, 628 (N.J. App. 1977).

[3] *E.g., People v. Pozo*, 746 P.2d 523, 527-29 (Colo. 1987) (immigration consequences); *People v. Miranda*, 184 Ill. App. 3d 718, 133 Ill. Dec. 142, 540 N.E.2d 1008, 1011-14 (1989) (same).

fact that the defendant was fully advised of the plea's direct consequences is irrelevant. They reason that incomplete or incorrect advisements on collateral consequences violate the Sixth Amendment right to effective assistance of counsel if the defendant would not have pleaded guilty but for the advice.[4]

Other jurisdictions disagree strongly. They hold that an incomplete or incorrect advisement on collateral consequences does not violate the Constitution because a knowledge of those consequences is not needed to make a valid guilty plea. Crucial to this determination is the fact that the defendant's due process rights were fully protected by a complete advisement on the plea's direct consequences.[5]

III. THE REASONING IN *GARCIA* THREATENS THE STRONG INTEREST OUR CRIMINAL JUSTICE SYSTEM HAS IN THE FINALITY OF GUILTY PLEAS.

Approximately 85% of all criminal charges result in guilty pleas. *See* Comment, "Collateral Consequences of

---

[4] *E.g.*, *United States v. Del Rosario*, 902 F.2d 55, 59 n.2 (D.C. Cir.), *cert. denied*, 111 S. Ct. 352, 112 L. Ed. 2d 316 (1990); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979); *Garcia*, 815 P.2d at 937; *People v. Correa*, 108 Ill. 2d 541, 92 Ill. Dec. 496, 485 N.E.2d 307, 310-12 (1985); *State v. Nichols*, 71 N.J. 358, 365 A.2d 467, 468-69 (1976).

[5] *Brown v. Perini*, 718 F.2d 784, 788 (6th Cir. 1983); *United States v. Sambro*, 454 F.2d 918, 922-23 (D.C. Cir. 1971); *United States v. Parrino*, 212 F.2d 919, 921-22 (2nd Cir.), *cert. denied*, 348 U.S. 840 (1954).

Guilty Pleas in the Federal Criminal Justice System," 16 Harv. C.R.C.L. L.Rev. 157, 161 n.17 (1981). This Court has long recognized the strong interest our justice system has in the finality of such pleas.

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

United States v. Timmreck, 441 U.S. 780, 784 (1979).

This Court should accept certiorari jurisdiction and definitively rule, as the Eighth Circuit initially did in *Hill v. Lockhart*, that: (1) criminal defendants have no constitutional right to be informed of the collateral consequences of their guilty pleas, and (2) because of that, even if a criminal defendant receives incomplete or incorrect advice on a collateral consequence, the plea is still valid if he or she was properly advised of the plea's direct consequences. Any other ruling unnecessarily weakens the finality interest our justice system has in guilty pleas.

As this Court has stated, "whether a plea of guilty is unintelligent and therefore vulnerable ... depends ... not on whether a court would retrospectively consider counsel's advice to be wrong, but whether that advice [was within the

range of competence demanded of attorneys in criminal cases]." *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). The complexity of many areas of law that are collaterally affected by guilty pleas are beyond the ability of many, if not most, minimally competent criminal defense attorneys.[6] A criminal defense attorney cannot, and need not under the Constitution, be all attorneys to all clients.

The Colorado Supreme Court's and Eighth Circuit's reasoning -- that a collateral consequence may be transformed into a direct consequence if counsel advises on it -- could easily spread to the majority of jurisdictions that hold defense attorneys have no duty to advise of collateral consequences. Besides the decisions following that reasoning, dicta in two federal courts of appeals cases illustrate its danger. *See United States v. Del Rosario*, 902 F.2d 55, 59 n.2 (D.C. Cir.), *cert. denied*, 111 S. Ct. 352, 112 L. Ed. 2d 316 (1990); *United States v. Campbell*, 778 F.2d 764, 768-69 (11th Cir. 1985). While the courts recognized the majority rule that defense attorneys have no duty to advise their clients of

---

[6] In *Garcia*, the challenged advice concerned the consequences the plea would have on the ability to prevail in an unfiled civil rights action. Civil rights law, especially in the context of a state criminal proceeding, is extremely complex. *See generally* J. Cook & J. Sobrieski, *Civil Rights Actions* (1991); D. Lee, *Defending 42 U.S.C. § 1983 Actions (1988)*; 6 Fed. Proc., L.Ed. § 11 "Civil Rights" (1989). It would be the rare case where a minimally competent criminal defense attorney could fully advise a criminal defendant on the likelihood of prevailing in a civil rights action based on arrest and charging decisions.

In addition, many collateral consequences cases deal with the effect a plea would have on immigration status, another highly specialized area of the law. *E.g.*, *George*, 869 F.2d at 333; *Pozo*, 746 P.2d at 523; *Oyekoya*, 558 So.2d at 990; *Mott*, 407 N.W.2d at 581. Such a detailed level of knowledge of areas of law outside criminal law should not, as a matter of law, be required to be within the level of practice of a minimally competent criminal practitioner.

collateral consequences, they suggested that collateral consequences may assume direct consequence status if counsel advises on them. The acceptance of such reasoning threatens the finality of all guilty pleas by reducing Rule 11 style guilty plea advisements to being meaningless rituals.

The purpose of the Sixth Amendment's right to counsel clause is to protect against unreliable convictions. *See Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Advice on collateral consequences has nothing to do with the issue of whether a person did what they pleaded guilty to. Following the *Garcia* line of cases, there is no lower limit on what -- as a matter of law -- a minimally competent defense attorney could be expected to know or convey to his clients while representing them with respect to guilty pleas.

Moreover, there is nothing that a trial court or prosecutor could do or say to insure that a plea made in open court is valid. Rule 11 and the similar rules in the states were designed to eliminate any need to have a later fact finding proceeding on a defendant's knowledge about the key factors that need to be considered before determining whether to plead guilty. *McCarthy,* 394 U.S. at 469. The subject of collateral consequences, "though no doubt of keen interest to the accused, is simply not central to what plea bargaining is all about, namely the obtaining of either reduced charges, a below-the-maximum sentence, or both." *Hill v. Lockhart*, 894 F.2d at 1011 (Bowman, J., dissenting). *Garcia* and like minded cases vitiate Rule 11 by opening lines of attack, possibly years after a plea was made, on the basis of a defendant's knowledge of all the possible consequences of a plea at the time it was made.

The *Garcia* line of cases allows defendants and their attorneys to create secret conditions necessary for the validity

of guilty pleas. This prevents prosecutors from being able participate in meaningful plea bargaining, and courts from accepting valid guilty pleas, thereby reducing society's interest in final guilty pleas to a nullity. Creative litigators would be allowed to attack perfectly valid guilty pleas that were given in full compliance with the requirements of due process, and where, as here, no claim is made that the plea lacked a factual basis or that the defendant was not guilty. Opening such a line of attack on guilty pleas would wreak havoc on and increasingly strain our already overburdened criminal justice system.

The question is not whether complete knowledge of every possible consequence of a guilty plea, both direct and collateral, would be a beneficial thing for defendants to have. Rather, the question is whether, on balance, any benefit to the defendant would be outweighed by the disastrous results to our criminal justice system. Our system would be severely compromised by large numbers of attacks being made on convictions based on guilty pleas.

CONCLUSION

The Colorado Supreme Court's decision in *Garcia* follows a growing trend. That trend, based on an incorrect reading of this Court's decision in *Hill v. Lockhart*, will devastate our criminal justice system by reducing Rule 11 advisements to being meaningless rituals. This Court recognized the importance of this threat when it granted certiorari in *Hill v. Lockhart*. That threat has not been dissipated by the passage of time, and its importance is growing. Colorado therefore requests this Court to issue a

writ of certiorari to review the Colorado Supreme Court's decision in *Garcia*.

GALE A. NORTON*
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

ROBERT MARK RUSSEL
First Assistant Attorney General

PAUL KOEHLER
Assistant Attorney General
Appellate Section

Attorneys for Petitioner

110 Sixteenth St., 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4540
*Counsel of Record

APPENDIX A

SUPREME COURT, STATE OF COLORADO JULY 15, 1991
No. 90SC416

THE PEOPLE OF THE STATE OF COLORADO,
Petitioner,

v.

PETE GARCIA, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC AND CASE JUDGEMENT AFFIRMED

REMANDED WITH DIRECTIONS

Gale A. Norton, Attorney General
Raymond T. Slaughter, Chief Deputy Attorney General
Timothy M. Tymkovich, Solicitor General
Paul Koehler, Assistant Attorney General
Denver, Colorado
Attorneys for Petitioner

David F. Vela, Colorado State Public Defender
Robin Desmond, Deputy State Public Defender
Denver, Colorado
Attorneys for Respondent

JUSTICE QUINN delivered the Opinion of the Court.

JUSTICE ERICKSON dissents, and CHIEF JUSTICE ROVIRA joins in the dissent.

JUSTICE VOLLACK dissents, and CHIEF JUSTICE ROVIRA and JUSTICE ERICKSON join in the dissent.

We granted certiorari to consider whether the court of appeals erred in *People v. Garcia*, 799 P.2d 413 (Colo. App. 1990), when it ordered the trial court to conduct an evidentiary hearing on the claim of the defendant, Pete Garcia, that his conviction on the charge of accessory to first degree assault was constitutionally infirm as violative of his constitutional right to effective assistance of counsel. Garcia's Crim. P. 35(c) claim alleged that his defense attorney failed to properly advise him regarding the effect of a guilty plea on his contemplated civil action against law enforcement officers for his arrest and prosecution, and that if he had been properly advised he would not have made the decision to plead guilty. In denying Garcia's motion, the trial court ruled that the acceptance of the guilty plea necessarily barred any civil claim arising out of the incident underlying the plea and that Garcia accordingly failed to demonstrate any actual prejudice as a result of his attorney's erroneous advice. The court of appeals reversed the judgment and remanded the case for further proceedings to determine whether defense counsel's advice fell below the standard of competence demanded of attorneys in criminal cases and whether there is a reasonable probability that defense counsel's erroneous advice caused Garcia to enter the guilty plea. We conclude that the court of appeals' resolution of this case is in accord with controlling legal standards, and we accordingly affirm the judgment.

I.

Garcia and his brother were charged with two counts

of attempted first degree murder,[7] two counts of first degree assault,[8] and two counts of committing a crime of violence.[9] The charges arose out of a shooting incident on March 27, 1987, when officers of the Jefferson County Sheriff's Department were in the process of executing a no knock search warrant for drugs at a residence in which Garcia and his brother were present. Garcia was arrested at the scene and remained in jail during the pendency of the proceeding against him. The sequence of events occurring thereafter is based on affidavits filed in connection with Garcia's Crim. P. 35(c) motion and testimony elicited at the hearing on the motion.

Following his arrest, Garcia retained an attorney to defend him on the charges. The defense attorney and the district attorney entered into plea negotiations, which culminated in the prosecution's offer to accept a guilty plea to the charge of accessory to commit first degree assault in exchange for the dismissal of the other pending counts. Defense counsel met with Garcia on December 19, 1987, to discuss the terms of the offer. During the course of their

---

[7]Attempted first degree murder, as charged, was a class 2 felony, § 18-2-101(4), 8B C.R.S. (1986), punishable by a presumptive minimum sentence of eight years and a presumptive maximum sentence of twenty-four years, § 18-1-105(1)(a)(IV), 8B C.R.S. (1986).

[8]Attempted first degree assault, as charged, was a class 3 felony, § 18-3-202(1)(e) & (2)(b), 8B C.R.S. (1986), punishable by a presumptive minimum sentence of four years and a presumptive maximum sentence of sixteen years, § 18-1-105(1)(a)(IV), 8B C.R.S. (1986).

[9]The crimes of violence, as charged, carried a mandatory sentence greater than the presumptive maximum sentence applicable to the substantive crime but no greater than twice the presumptive maximum term. § 16-11-309(1)(a), 8A C.R.S. (1986).

conversation, Garcia informed defense counsel that he did not want to jeopardize his right to file a civil action against the officers involved in the incident resulting in his arrest and prosecution. Following defense counsel's assurance that a plea of guilty would not bar any civil action, Garcia agreed to plead guilty to the charge of accessory to commit first degree assault.

On December 21, 1987, Garcia appeared in court with defense counsel and again inquired of counsel whether the guilty plea would adversely affect his contemplated civil action. After receiving reassurance from defense counsel that it would not, Garcia signed a written acknowledgement that he had been adequately advised by his attorney of his rights, that he understood his rights, as well as the nature of the charges and the elements of the offense to which he was pleading guilty, that he understood the possible penalties applicable to his guilty plea, and that his plea was voluntary. The trial court arraigned Garcia on the accessory charge and accepted his plea of guilty.[10]

Several weeks later, at a presentence hearing, the court entered a judgment of conviction on the guilty plea and ordered Garcia to pay restitution in the amount of $252.07 as well as court costs and a probation supervision fee.

In March 1988 Garcia filed in the United States District

---

[10]The crime of accessory to first degree assault, as charged, was a class 5 felony, § 18-8-105(4), 8B C.R.S. (1986), punishable by a presumptive minimum sentence of one year and a presumptive maximum sentence of four years, § 18-1-105(1)(a)(IV), 8B C.R.S. (1986).

Court a pro-se civil complaint against several law enforcement officers for his arrest and prosecution resulting from the incident of March 27, 1987. Garcia later retained the services of an attorney, who filed an amended complaint but later dismissed the civil action on the basis that Garcia's claims were barred as a result of his guilty plea.[11] Thereafter on September 29, 1988, Garcia filed a motion to vacate his conviction pursuant to Crim. P. 35(c). Garcia asserted in his motion that prior to entering his guilty plea he specifically inquired of defense counsel on at least two occasions whether a guilty plea would affect his ability to initiate a civil action against the law enforcement officers

---

[11] Garcia's initial complaint in federal court was based on 42 U.S.C. § 1983 (1989) and named as defendants the County of Jefferson, the Jefferson County Sheriff, and various deputy sheriffs designated as John Does. Garcia's claim against Jefferson County was dismissed because the complaint failed to allege that any of the individual defendants were acting pursuant to a county custom or practice. The claim against the individual officers was dismissed as vague and conclusory. Garcia also included in the federal complaint a common law claim for abuse of process. The federal district court dismissed that claim, since Garcia had filed an identical lawsuit in the state court. In dismissing Garcia's claims, the federal court granted him leave to file an amended complaint. His attorney thereafter filed the amended complaint, but then voluntarily dismissed the federal action upon determining that the claims were barred as a result of Garcia's guilty plea.

The civil action filed by Garcia in the state court was dismissed due to his failure to comply with the notice provisions of the Governmental Immunity Act.

involved in the incident on March 27, 1987, that he was advised by defense counsel that his guilty plea would have no effect on his civil remedies, and that he would not have entered the guilty plea if he had been aware and correctly advised of his inability to bring a civil claim in connection with his arrest and criminal prosecution. Garcia's motion was supported by his own affidavit as well as the affidavit of the attorney who represented him when the guilty plea was entered. Defense counsel's affidavit averred as follows:

> During our discussions concerning the plea agreement, Mr. Garcia inquired of me as to whether or not he would still be able to pursue civil remedies for claims arising as a result of the incident for which I was representing him even though he was entering a plea of guilty.
>
> At that time, I believed that Mr. Garcia's civil remedies would not be barred if he ple[d] guilty in the case and I advised him of this.
>
> Subsequent to our discussions, Mr. Garcia executed a Petition to Enter a Plea of Guilty and did in fact enter a plea of guilty in that case.

During the hearing on the Crim. P. 35(c) motion, the prosecution called defense counsel as a witness. Defense counsel testified that he advised Garcia that his conviction "could be used for impeachment purposes," but that he did not believe the conviction would bar Garcia's civil remedies. The attorney acknowledged that, although he had never filed a claim for false imprisonment or malicious prosecution, he consulted with several other attorneys on this matter before advising Garcia of the effect of his plea on any contemplated civil action.

The trial court denied Garcia's motion. Noting that Garcia was not contesting the validity of the court's advisement at the providency hearing, the court ruled that its acceptance of the guilty plea was a determination that the charge against Garcia was true, that guilty plea constituted a bar to Garcia's civil action, and that Garcia failed to show any actual prejudice resulting from any alleged incompetency of defense counsel.

Garcia appealed the judgment to the court of appeals, which reversed the judgment and remanded the case to the trial court for further proceedings. The Court of Appeals concluded that defense counsel gave Garcia incorrect advice regarding the consequences of a guilty plea and failed to base that advice on adequate research. The court accordingly directed the trial court to determine whether defense counsel's performance was constitutionally deficient. The court of appeals also was of the view that the trial court's resolution of the prejudice issue incorrectly focused on whether Garcia's "civil claims were dismissed because of 'truths' he admitted by virtue of his guilty plea" rather than by evaluating whether "there is a reasonable probability that he would not have pleaded guilty but for counsel's error." 799 P.2d at 415. We thereafter granted the People's petition to consider the correctness of the court of appeals' resolution of this case.

II.

The Sixth Amendment of the United States Constitution guarantees an accused the right to effective assistance of counsel. The purpose of this constitutional guarantee is to ensure the accused a level of assistance calculated to produce a fair and just result in a criminal

prosecution. *E.g., United States v. Cronic*, 466 U.S. 648, 655-56 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980); *see Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). The constitutional standards for resolving a claim of ineffective assistance of counsel provide the analytical framework for resolving this case.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court outlined the standards for evaluating a claim that a criminal conviction was obtained in violation of an accused's right to effective assistance of counsel. The Court held that any such claim must satisfy two components: first, defense counsel's performance must have been constitutionally deficient; and second, the deficient performance must have prejudiced the defense of the case. *Id.* at 687. While an ineffective-assistance claim involves an inquiry into matters of historical fact, the proper resolution of both the performance and prejudice components of the claim is a mixed question of fact and law. *Id.* at 698. Unless the defendant establishes both components, "it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

The test for evaluating an attorney's performance is whether the attorney's assistance is within the range of competence demanded of attorneys in criminal cases under prevailing professional norms. *Id.* at 688. Because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant," a court must be "highly deferential" in reviewing counsel's performance and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance." *Id.* at 688-89. The court reviewing counsel's performance, therefore, should ignore "the distorting effects of hindsight," and should make every effort to "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Id.* at 689. In light of the fact that counsel's actions are often based on "informed strategic choices made by the defendant and on information supplied by the defendant," judicial inquiry into conversations between the defendant and defense counsel regarding matters of special concern to the defendant's strategic litigation decision will play a critical role in the evaluation of counsel's performance. *Id.* at 691.

The prejudice component of an ineffective-assistance claim requires the defendant affirmatively to prove prejudice. *Id.* at 693. While this requirement means that the defendant must establish more than the mere possibility that counsel's errors affected the outcome of the proceeding, it does not require the defendant to prove that counsel's errors "more likely than not altered the outcome in the case." *Id.* The prejudice component requires the defendant to prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability, in this sense, is "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* In resolving an ineffective-assistance claim, a court is not required to first determine whether counsel's performance was constitutionally deficient, for if the defendant fails to make an affirmative demonstration of prejudice, then the court may resolve the claim on that basis alone. *Id.* at 697.

Although *Strickland* involved an ineffective-assistance claim based on counsel's conduct at a capital sentencing

hearing, the standards adopted therein are equally applicable to a conviction based on a guilty plea to a criminal charge. In *Hill v. Lockhart*, 474 U.S. 52 (1985), for example, the issue was whether a defendant's guilty pleas to first degree murder and theft were constitutionally infirm due to defense counsel's incorrect advice that the defendant, although a second offender, would be eligible for parole after serving one-third rather than one-half of his prison sentence. Acknowledging that there was no constitutional precedent requiring a trial court to inform the defendant of his parole eligibility and that the defendant's claim was not based on any such assertion, the Supreme Court adopted the same two-part test of *Strickland* in evaluating an ineffective-assistance claim arising out of the plea process. *Id.* at 56-58. Under the first part of the *Strickland* test, the voluntariness of an accused's counseled guilty plea will depend "on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The Court concluded, however, that Hill failed to satisfy the prejudice component of *Strickland* by failing to allege in his habeas petition that he would have pleaded not guilty and insisted on going to trial if his attorney had correctly advised him about his parole eligibility date. *Id.* at 60. It thus was unnecessary for the Court to determine whether Hill's allegations regarding defense counsel's erroneous advice satisfied the performance component of *Strickland*.[12]

---

[12] In *Hill*, Justice White, joined by Justice Stevens, concurred in the judgment. Justice White pointed out that Hill had signed a written "plea statement," a standardized form to be completed by defense counsel in conjunction with his client, indicating that he understood the charges and the consequences of pleading guilty and that he was aware of

We had occasion to apply the *Strickland-Hill* principles in *People v. Pozo*, 746 P.2d 523 (Colo. 1987), where we considered the cognizability of a defendant's claim that his guilty pleas to second degree sexual assault and escape were involuntary due to defense counsel's failure to advise the defendant of the possible deportation consequences of the guilty pleas. We held in *Pozo* that a trial court, in evaluating the significance of defense counsel's failure to investigate and research a particular body of law prior to advising a defendant on a proposed plea bargain, must first determine "whether the body of law was relevant to the circumstances of the client and the matters for which the attorney was retained," and then whether the attorney had reason to believe "that the area of law in question was relevant to the client and the client's legal problems." *Id.* at 527-28. We went on to conclude that, in the context of Pozo's alien status, the potential deportation consequences of his guilty pleas could

---

everything in the plea statement. However, in the space provided for disclosing the number of prior convictions, Hill's form read "0." 474 U.S. at 61. In Justice White's view, Hill thus had no factual basis for suggesting that his attorney's advice was incompetent or that he was affirmatively misled by counsel as to his earliest possible parole eligibility date. *Id.* Justice White went on to emphasize, however, that were it not for the misinformation in the police statement, Hill would be entitled to relief if his defense attorney had known of the prior conviction and still informed Hill that he would be eligible for parole after serving one-third of his sentence. *Id.* at 62. Moreover, Justice White also was of the view that the record revealed that Hill alleged sufficient facts to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

significantly affect his decision to plead guilty and thus constituted a critical part of effective representation. *Id.* at 529. Because, however, the record in *Pozo* did not establish whether defense counsel had reason to know that Pozo was an alien, we ordered the case to be remanded to the trial court for resolution of that question as well as the question of prejudice. *Id.* at 529.[13]

It is in light of the principles explicated in *Strickland*, *Hill*, and *Pozo* that we must evaluate the propriety of the court of appeals' reversal of the trial court's denial of Garcia's Crim. P. 35(c) motion and the court of appeals' order of remand to the trial court for a further evidentiary hearing.

III.

Garcia's Crim. P. 35(c) motion specifically alleged that he inquired of defense counsel whether a guilty plea would bar his contemplated civil action arising out of the incident on which the criminal charges were based and that he was told by defense counsel that his civil action would not be barred. Moreover, in contrast to the defective habeas petition in *Hill*, Garcia's Crim. P. 35(c) motion also alleged that he would not have entered a guilty plea if defense counsel had advised him that a guilty plea would constitute a bar to his contemplated civil action. The allegations

---

[13] In its ruling, the trial court distinguished the facts of this case from those of *People v. Pozo*, 746 P.2d 523 (Colo. 1987), on the basis that this case involved only the defendant's right to initiate a civil action while *Pozo* involved a significant liberty interest in avoiding deportation.

pertaining to defense counsel's advice to Garcia were supported by the affidavit and testimony of defense counsel, who expressly acknowledged that he answered Garcia's repeated requests about the effect of a guilty plea on Garcia's civil action by telling him that guilty plea would not bar any civil claim.

There is no question that the legal advice sought by Garcia was highly significant to his ultimate decision to plead guilty to the accessory charge, nor is there any doubt that defense counsel knew of its significance to Garcia's acceptance of the offered plea bargain. In denying Garcia's ineffective-assistance claim, however, the trial court declined to consider the performance component of the claim and instead resolved Garcia's claim on the basis of no prejudice. While we recognize that we are obliged in the first instance to presume that defense counsel's advice fell within the range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, we are satisfied in this case that the evidence before the trial court was sufficient to neutralize that presumption. Whether or not defense counsel's advice was incorrect and, if so, whether it was so unreasonable as to amount to ineffective assistance raised a mixed question of fact and law, *id.* at 698, which cannot be decided on the state of this record. In the absence of a legally sound ruling on the lack of prejudice -- an issue we presently address -- it was incumbent on the trial court to resolve the performance component of Garcia's ineffective-assistance claim on the basis of a fully developed record. We agree, therefore, with that part of the court of appeals' decision remanding the case to the trial court for further hearings on the performance component of Garcia's claim.

We turn then to the prejudice element of Garcia's ineffective-assistance claim. In resolving the issue of

prejudice, the court of appeals concluded that the trial court incorrectly focused on whether Garcia's civil complaint was "dismissed because of 'truths' he admitted by virtue of his guilty plea" rather than determining whether "there is a reasonable probability that he would not have pleaded guilty but for counsel's error." 799 P.2d at 415. We agree with the court of appeals' conclusion. The proper standard for resolving the issue of prejudice, as stated by the Supreme Court in *Hill*, is whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. The trial court should have focused on that standard in determining whether, if defense counsel had properly advised Garcia about the effect of a guilty plea on his contemplated civil action against the law enforcement officers, Garcia would have rejected the plea bargain and would have risked a trial on the more serious charges in lieu of a guilty plea to the accessory charge.

We accordingly affirm the judgment of the court of appeals, and we remand the case to that court with directions to return the case to the trial court for further proceedings consistent with the views herein expressed.

JUSTICE ERICKSON dissents, and CHIEF JUSTICE ROVIRA joins in the dissent.

JUSTICE VOLLACK dissents, and CHIEF JUSTICE ROVIRA and JUSTICE ERICKSON join in the dissent.
People v. Garcia, No. 90SC416

JUSTICE ERICKSON dissenting:

I join Justice Vollack in his dissent, but write separately to emphasize the purpose of the providency hearing and the

limited grounds for setting aside a defendant's guilty plea. In my dissent in *People v. Pozo*, 746 P.2d 523 (Colo. 1987), I emphasized the limited scope of a claim of ineffective assistance of counsel in an attack on the validity of a plea of guilty. (Erickson, J., dissenting). 746 P.2d at 530. I joined Justice Rovira in his dissent and in his analysis:

> The interest at stake in a Crim. P. 11 proceeding is whether the defendant voluntarily entered a plea of guilty to the crime for which he was charged.
>
> In *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970), the defendant sought post-conviction relief on the ground that had he known of a subsequent Supreme Court decision at the time of his plea, he never would have pleaded guilty. The Supreme Court rejected his argument stating:
>
> > Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment.
>
> 397 U.S. at 748, 90 S. Ct. at 1468. The Supreme Court also said:
>
> > A plea of guilty entered by one fully aware of **direct** consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own

> counsel, must stand unless induced by threats ... misrepresentation ... or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business.
>
> 397 U.S. 742, 755, 90 S. Ct. 1463, 1472, 25 L. Ed. 2d 747 (1970), quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26, 78 S. Ct. 563, 2 L. Ed. 2d 579 (1958) (emphasis added).
>
> There is no contention by Pozo that he did not understand the direct consequences of his plea or that his plea was invalid because of any threat, misrepresentation, or other impropriety.

746 P.2d at 531 (Rovira, J., dissenting).

Here, the defendant claims that his counsel's failure to properly advise him that his plea of guilty would limit his civil claims relating to his arrest and prosecution vitiates his plea. No claim is made that a factual basis is lacking for the plea, or that the defendant did not in fact commit the crimes charged. Erickson, *The Finality of a Plea of Guilty*, 48 Notre Dame Law. 835 (1973).

CHIEF JUSTICE ROVIRA joins in this dissent.

JUSTICE VOLLACK dissenting:

The majority holds that a criminal defense attorney's misinformation regarding the effect of a guilty plea on a defendant's civil remedies may be ineffective assistance of counsel requiring the withdrawal of the defendant's plea. I believe the majority's opinion is an expansion of *People v. Pozo*, 746 P.2d 523 (Colo. 1987) (attorney's failure to advise a client of potential deportation consequence of a guilty plea may constitute ineffective assistance of counsel), signalling an open invitation for defendants to challenge guilty pleas based on any number of collateral consequences. In my view, the majority elevates the effective assistance of counsel guarantee of the sixth amendment beyond its intended purpose and will result in an impossible burden. Accordingly, I dissent.

The defendant was charged with two counts of attempted first degree murder, two counts of first degree assault, and two counts of committing a crime of violence. He pleaded guilty to a charge of accessory to commit first degree assault in exchange for dismissal of the other counts. In so pleading, the defendant signed a written acknowledgement that his attorney had advised him of his rights, that he understood by pleading guilty he waived certain constitutional rights, that he understood the nature of the charge and the elements of the offense to which he was pleading guilty, that he understood the possible penalties applicable to his plea, and that his plea was voluntary. The defendant later filed a motion to vacate his conviction pursuant to Crim. P. 35(c), alleging that, in response to his inquiries, defense counsel had misinformed him that a guilty plea would not jeopardize his ability to bring a civil claim related to his arrest and criminal prosecution. The trial court denied the motion, concluding that the defendant had not established that he had been prejudiced by his attorney's

advice. The court of appeals reversed and remanded the case to the trial court to determine whether defense counsel's conduct "fell below acceptable standards" and whether the defendant was prejudiced. *People v. Garcia*, 799 P.2d 413, 415 (Colo. App. 1990).

When a conviction is attacked by means of a Crim. P. 35(c) motion, "the legality of the judgment and the regularity of the proceedings leading up to the judgment are presumed. The burden is upon the defendant to establish by at least the preponderance of the evidence the allegations" of the motion. *Lamb v. People*, 174 Colo. 441, 446, 484 P.2d 798, 800 (1971) (citations omitted). The test for determining the validity of a guilty plea is whether the plea was made voluntarily and knowingly. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Harshfield v. People*, 697 P.2d 391, 393 (Colo. 1985). Thus, the defendant in the present case must show that defense counsel's performance was constitutionally inadequate so as to render his plea involuntary. *See Hill*, 474 U.S. at 56.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established the standards for determining whether "[defense] counsel's assistance was so defective" as to constitute a denial of the defendant's sixth amendment guarantee to effective assistance of counsel. *Id.* at 687. The defendant must show that (1) counsel's performance was constitutionally deficient, and (2) the deficient performance prejudiced the defense. *Id.* In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Court held that the two-part test applied to challenges to guilty pleas based on ineffective assistance of counsel.

In its explanation of this test, the *Strickland* Court made several critical statements regarding the sixth amendment

guarantee that bear on the case presented to this court. Throughout the opinion, the Court reiterated that the constitutional right to effective assistance of counsel is deemed necessary to ensure that fairness predominates in the adversarial system so that just results are attained. *See Strickland*, 466 U.S. at 685. Hence, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. In deciding the reasonableness of counsel's conduct, the court should be mindful that it is counsel's function "to make the adversarial testing process work in the particular case," and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. In advising that "[J]udicial scrutiny of counsel's performance must be highly deferential," *id.* at 689, the Court cautioned that

> [t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.... Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id. at 690. Thus, "[c]ourts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.* at 697.

In my view, by opening the Pandora's box of collateral consequences with today's opinion, the majority of this court ignores *Strickland's* caution by imposing an unreasonable burden on defense counsel to the detriment of our criminal justice system. Moreover, the majority's holding to include advice on the collateral consequences of guilty pleas among the constitutional guarantees of an accused contradicts "the fundamental interest in the finality of guilty pleas." *Hill v. Lockhart*, 474 U.S. at 58.

In his dissent to *Pozo*, Chief Justice Rovira noted that the purpose served by a Crim. P. 11 proceeding is to ensure that the defendant voluntarily and knowingly pleads guilty to the crime for which he is charged, and an ineffectiveness of counsel challenge to a guilty plea is relevant only in relation to the defendant's voluntariness and understanding in pleading guilty. *Pozo*, 746 P.2d at 531 (Rovira, J., dissenting). A plea is knowing and voluntary, and thus devoid of constitutional infirmity, when the defendant is fully aware of the **direct** consequences of the plea; that is, those having a "'definite, immediate, and largely automatic effect on the range of [a defendant's] punishment.'" *Id.* (quoting *People v. Heinz*, 197 Colo. 102, 106, 589 P.2d 931, 933 (1979) (quoting *Cuthrell v. Director*, 475 F.2d 1364, 1366 (4th Cir. 1973))). Indeed, in *Brady v. United States*, 397 U.S. 742 (1970), the United States Supreme Court explicitly stated that "[a] plea of guilty entered by one fully aware of the **direct** consequences" is valid, *id.* at 755 (emphasis added), regardless of whether counsel failed to advise the defendant of the numerous collateral consequences of pleading guilty.

Direct consequences relate strictly to sentencing, whereas collateral consequences are many and conceivably beyond the legitimate sphere of a criminal defense attorney's expertise. They may include the loss of civil service employment, the right to vote, the ability to travel freely abroad, exclusion from military service, as well as adverse social consequences. *See generally* J. Bond, *Plea Bargaining & Guilty Pleas* §§ 3.38-.49 (2d ed. 1983). While each of these results may have a harsh impact on a defendant, I agree with those jurisdictions denying that defendants have a constitutional right to be informed of such collateral consequences. *See United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990); *United States v. Crowley*, 529 F.2d 1066, 1072 (3d Cir. 1976); *Cuthrell v. Director*, 475 F.2d 1364, 1366 (4th Cir. 1973); *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir. 1971); *Redwine v. Zuckert*, 317 F.2d 336, 338 (D.C. Cir. 1963); *Oyekoya v. State*, 558 So. 2d 990, 990-91 (Ala. Crim. App. 1989); *State v. Casseus*, 513 So. 2d 1045, 1045 (Fla. 1987); *Clark v. State*, 736 S.W.2d 483, 484 (Mo. App. 1987); *Commonwealth v. Frometa*, 520 Pa. 552, , 555 A.2d 92, 93 (1989); *State v. Santos*, 136 Wis. 2d 528, , 401 N.W.2d 856, 858 (Wis. App. 1987). In my view, a defendant's constitutional guarantee to effective assistance of counsel is fulfilled when that defendant is made fully aware of the **direct** consequences of pleading guilty. Thus, a voluntary and knowing plea does not require knowledge of collateral consequences, for "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," but simply to ensure that fairness prevails in criminal proceedings. *Strickland v. Washington*, 466 U.S. at 689.

Accordingly, in the present case, the trial court was only required to determine if the defendant was fully aware of the direct consequences of pleading guilty to the charge of

accessory to commit first degree assault. That he understood and voluntarily agreed to those consequences is evidenced by his signing the written acknowledgement. The defendant does not attack his counsel's advice on the direct effect of his guilty plea. Instead, the defendant's sole ground for vacating his conviction was his attorney's advice on the collateral consequence of a guilty plea on his civil case. I respectfully dissent.

I am authorized to say that CHIEF JUSTICE ROVIRA and JUSTICE ERICKSON join in this dissent.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL PAGINATION IS NOT COUNTINUOUS.

ORIGINAL

Supreme Court, U.S.
FILED
JAN 10 1992
OFFICE OF THE CLERK

CASE NO.91-963

SUPREME COURT OF THE UNITED STATES, OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

PETE GARCIA, Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

ON BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

DAVID F. VELA
COLORADO STATE PUBLIC DEFENDER

ROBIN DESMOND
COUNSEL OF RECORD
DEPUTY STATE PUBLIC DEFENDER

110 16th Street Room 800
Denver, CO 80202
(303) 620-4888

ATTORNEYS FOR MR. PETE GARCIA

CASE NO. 91-963

SUPREME COURT OF THE UNITED STATES, OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

PETE GARCIA, Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

ON BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Pete Garcia moves pursuant to Rule 39 of the United States Supreme Court Rules for leave to proceed *in forma pauperis* and without payment of fees or costs in this matter, for the following reasons:

1. Mr. Garcia is today filing a Brief in Opposition to the Petition for Writ of Certiorari filed by the state in this court.

2. Mr. Garcia has been represented by court-appointed counsel, the Colorado State Public Defender, throughout his appeal. He has been declared indigent by the courts of the State of Colorado and has proceeded *in forma pauperis* since 1988.

3. Mr. Garcia is without funds with which to pay the costs of this proceeding.

4. Mr. Garcia should not be deprived if his opportunity to respond to the State's petition for writ of certiorari solely due to his indigency. He therefor requests leave to proceed in forma pauperis

DAVID F. VELA
COLORADO STATE PUBLIC DEFENDER

Robin Desmond

ROBIN DESMOND
COUNSEL OF RECORD
DEPUTY STATE PUBLIC DEFENDER
110 16th Street Room 800
Denver, CO 80202
(303) 620-4888

ATTORNEYS FOR MR. PETE GARCIA

CASE NO. 91-963

SUPREME COURT OF THE UNITED STATES, OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

PETE GARCIA, Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

ON BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

DAVID F. VELA
COLORADO STATE PUBLIC DEFENDER

ROBIN DESMOND
COUNSEL OF RECORD
DEPUTY STATE PUBLIC DEFENDER

110 16th Street Room 800
Denver, CO 80202
(303) 620-4888

ATTORNEYS FOR PETE GARCIA

AFFIDAVIT OF PETE GARCIA IN SUPPORT OF

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

I, Pete Garcia, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on the Brief in Opposition to the Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of defending against Petition for Writ of Certiorari and related proceedings are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   January 1987

   $1,000/mo.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Food stamps.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

$110.00/mo.

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and other clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

1965 Corvair -- $50; 1952 International Van -- $100

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Pete Garcia

Subscribed and sworn to before me this 9th day of January, 1992.

Susan K. Rubin

My commission expires on 2-10-93.

ORDER

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

DATED: _____, 1992.

_____

JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

CASE NO.91-963

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

PETE GARCIA, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition For Writ Of Certiorari To The Colorado Supreme Court

DAVID F. VELA
COLORADO STATE PUBLIC DEFENDER

ROBIN DESMOND
COUNSEL OF RECORD
DEPUTY STATE PUBLIC DEFENDER

110 16th Street Room 800
Denver, CO 80202
(303) 620-4888

ATTORNEYS FOR MR. PETE GARCIA

CASE NO.91-963

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

PETE GARCIA, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition For Writ Of Certiorari To The Colorado Supreme Court

INTRODUCTION

Mr. Pete Garcia was the accused citizen below and will be referred to by name or as the accused. The State of Colorado was the prosecution below and will be referred to as the petitioner, the state or the prosecution. References to volume and page numbers in the following form (v1, p1), refer to the volume and page numbers of the record on appeal in the Colorado Supreme Court.

STATEMENT OF THE CASE

On March 27, 1987, the Jefferson County sheriff's department executed a search warrant on the residence of Alger Garcia based on information from a confidential informant for illegal drug transactions involving Alger. Pete Garcia was asleep in the home. The officers first set off a flashbang and then shot the three dogs who were chained on the property. Pete Garcia ran from the home. Alger Garcia opened fire wounding two deputy sheriffs. (v1, p114-116) Pete Garcia was charged, apparently on a complicity theory, of two

counts of attempted first degree murder, two counts of first degree assault and two counts of crime of violence.[1] (v1, p13-15) Bond was set in the amount of $1,000,000. It was later reduced to $500,000. Mr. Garcia remained in custody until he entered a plea pursuant to plea negotiations. (v2, p3-4)

The district attorney offered to allow Mr. Garcia to plead guilty to one count of accessory to commit first degree assault.[2] (v1, p64) However, Mr. Garcia was concerned about the effect a guilty plea would have on his right to pursue a civil action against the sheriff's department. On at least two known occasions, he questioned his attorney on that effect and, on both occasions, his attorney advised him that a plea of guilty would not bar a civil action.[3] (v2, p7-9) Mr. Garcia accepted the offer and entered a plea of guilty to accessory to first degree assault on December 21, 1987.[4] (v2, p4-5)

After discovering that several of his civil claims had to be dismissed because they were barred due to his plea of guilty, Mr. Garcia filed a motion to withdraw his plea alleging ineffective assistance of counsel in that he would not have pleaded guilty had he been correctly advised concerning his civil suit. (v1, p72-79) At the hearing on this motion, Mr. Garcia's original trial counsel testified that Mr. Garcia was "continually concerned" about his civil remedies and that he advised Mr. Garcia that his civil remedies would not be barred. (v2, p7-8)

---

1. If convicted, Mr. Garcia faced a mandatory minimum sentence of eighty years in the Colorado Department of Corrections up to one hundred and sixty years.

2. Accessory to commit first degree assault carries a potential sentence of from one to four years.

3. Throughout the Petition for Writ of Certiorari, the state uses the word "prevail." Mr. Garcia has never claimed that his attorney advised him that the effect of his guilty plea would not effect his ability to prevail in a civil action.

4. Mr. Garcia testified that his attorney explained to him that his plea of guilty was pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), which he understood to mean that he would plead guilty to something which was not true in order to get out of jail. (v2, p6)

The trial court denied Mr. Garcia's motion finding that Mr. Garcia was not prejudiced because he admitted the truth of the charges in his plea of guilty and it was this truth which barred the civil action. (v1, p83) The trial court did not address the professional competency component of an ineffective assistance of counsel claim.

The Colorado Court of Appeals reversed the trial court's finding that defense counsel's advice that Mr. Garcia's plea would not bar his desired civil claims was contrary to Colorado law and was not based on adequate research. The Colorado Court of Appeals further found that the "trial court incorrectly focused on whether [Mr. Garcia's] civil claims were dismissed because of 'truths' he admitted by virtue of his guilty plea" instead of applying the appropriate test for prejudice as set out in *Hill v. Lockhart*, 474 U.S. 52 (1985). The Court of Appeals refused to conclude, as a matter of law, that defense counsel's conduct fell below acceptable standards. Instead, the case was remanded for factual determinations on prejudice based on the correct standard and whether defense counsel's incorrect advice fell below the range of reasonable competence demanded of attorneys in criminal cases.

On certiorari, the Colorado Supreme Court affirmed the Court of Appeals' finding that the proper standard for resolving the issue of prejudice was the determination of whether there was a reasonable probability that, but for counsel's errors, Mr. Garcia would not have pleaded guilty and would have instead insisted on going to trial. The Court held that, "[t]he trial court should have focused on that standard in determining whether, if defense counsel had properly advised Garcia about the effect of a guilty plea on his contemplated civil action against the law enforcement officers, Garcia would have rejected the plea bargain and would have risked a trial on the more serious charges in lieu of a guilty plea to the accessory charge." The Supreme Court then remanded the case to the trial court for determination of the professional competency component of the test for effective assistance of counsel.

Colorado did not decide in this case that a defendant could receive ineffective assistance if he were misadvised regarding a collateral consequence. It simply corrected the standard used in the trial court for determining prejudice on an ineffective assistance claim.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF THE ARGUMENT

This Court should not grant the state's request for a writ of certiorari because the question presented to this Court involves an issue which was not decided by the Colorado Supreme Court and is therefore not ripe. Any decision by this Court would be of an advisory nature only.

THE QUESTION PRESENTED FOR REVIEW WAS NOT DECIDED BY THE COLORADO SUPREME COURT.

Petitioner states that the question presented for review is: **"Whether, as explicitly left undecided by this Court in *Hill v. Lockhart*, 474 U.S. 52 (1985), criminal defense attorneys are ineffective under the federal constitution for failing to advise correctly their clients about a collateral consequence of a guilty plea?"** The State contends that this Court should grant a writ because this case addresses an issue left open by *Hill v. Lockhart, supra*, and because this case conflicts with other decisions issued by United States courts of appeals.

Both in the question presented and in its first argument for reasons to grant the Writ, the Petitioner maintains that this Court declined to address this issue in *Hill v. Lockhart, supra*. That is incorrect. In *Hill*, this Court declined to address "whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel..." 474 U.S. at 211. (emphasis added). This case presented no issue relative to advice regarding parole eligibility.

Furthermore, the wording of this question makes it appear as if the the Colorado courts held in this case that an attorney must advise their clients of all collateral

consequences of a guilty plea to avoid a finding of ineffective assistance of counsel. Although Mr. Garcia was affirmatively misadvised of a collateral consequence, neither the Colorado Court of Appeals nor the Colorado Supreme Court decided the issue of constitutional ineffective assistance of counsel.

As this Court is aware, to prevail on an ineffective assistance claim a criminal defendant must establish that 1) defense counsel's performance was constitutionally deficient and 2) the deficient performance must have prejudiced the defense of the case. However, *Strickland v. Washington, 466 U.S. 668 (1984)*, does not always require a court to consider both aspects of an ineffective claim. If a criminal defendant has failed to meet his burden on either portion of the standard, the court need go no further. In this case, the trial court did not address both components because it found that Mr. Garcia had failed to prove the prejudice prong. Under *Strickland v. Washington, supra*, the trial court was not required to address the standard of practice component.

However, in making its ruling on the prejudice component, the trial court applied an erroneous standard. The Colorado Supreme Court affirmed the Colorado Court of Appeals and reversed the trial court in its determination of the prejudice part of the ineffective assistance test required by *Strickland v. Washington, supra*. The Colorado Supreme Court then remanded the case to the trial court to determine if defense counsel's erroneous advise fell below the range of competence demanded of attorneys in criminal cases pursuant to *Hill v. Lockhart, supra*.

Although this case does deal with ineffective assistance in relation to a guilty plea tendered in a situation where counsel misadvised his client on a collateral issue, neither that issue nor the question presented by Petitioner was decided by the Colorado Supreme Court in this case. As the Colorado Supreme Court stated in its opinion, "[w]hether or not defense counsel's advice was incorrect and, if so, whether it was so unreasonable as to amount to ineffective assistance raised a mixed question of fact and law, (cite omitted), which cannot be decided on the state of this record."

CONCLUSION

Because the Colorado Supreme Court did not address the issue raised by the state's petition for a writ of certiorari, this Court should deny the state's request for a writ.

DAVID F. VELA
Colorado State Public Defender

ROBIN DESMOND
COUNSEL OF RECORD
Deputy State Public Defender
Attorneys for Defendant-Appellant
110 Sixteenth Street, Suite 800
Denver, Colorado 80202
620-4888

CASE NO.91-963

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

PETE GARCIA, Respondent

RECEIVED
JAN 13 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PROOF OF SERVICE

I, Robin Desmond, a member of the Bar of the Court, hereby certify that on the 10th day of January, 1992, one copy of the Motion to Proceed in Forma Pauperis, Affidavit in Support of the Motion to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were sent by mail, postage pre-paid:

Gail Norton
110 16th St.
10th Floor
Denver, Colorado 80202

I further certify that all parties required to be served have been served.

Robin Desmond
ROBIN DESMOND
Counsel for Respondent